

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34303

DANNY R. RAINES,)	2008 Unpublished Opinion No. 672
)	
Petitioner-Appellant,)	Filed: October 7, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Valley County. Hon. Thomas Neville, District Judge.

Summary dismissal of application for post-conviction relief, affirmed.

Danny R. Raines, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Ann Wilkinson, Deputy Attorney General, Boise, for respondent.

LANSING, Judge

Danny R. Raines appeals pro se from the district court's summary dismissal of his petition for post-conviction relief. We are asked to determine whether the allegations contained in the petition were sufficient to entitle Raines to an evidentiary hearing. For the reasons given below, we affirm.

I.

BACKGROUND

The record on appeal does not include the record or transcripts from the underlying criminal case, and therefore the background information presented here is somewhat limited. However, the relevant facts and procedure as revealed by the limited record follow.

Raines was charged with aggravated assault stemming from a domestic dispute with his apparent girlfriend, Pamela Songer. Two days after his May 29, 2003 preliminary hearing, Raines allegedly received two letters from Songer postmarked May 27, 2003. The letters contained statements that allegedly contradicted the prosecutor's statements, made during

Raines's May 29 hearing, that reconciliation between Raines and Songer was unlikely and that Songer feared Raines. The letters also stated that Songer had told the prosecutor she would not testify against Raines and that the prosecutor had told Songer that the charge against Raines would be reduced from a felony to a misdemeanor.

The charge was not reduced, and Raines ultimately pled guilty to aggravated assault. He was sentenced on October 31, 2003 to five years' imprisonment, with two-and-a-half years fixed. Raines filed a Rule 35 motion, which was denied, and also filed an untimely appeal that was dismissed. Raines later filed a pro se petition for post-conviction relief on December 15, 2003, and filed a supplemental motion for appointment of counsel on January 26, 2004. On February 21, 2007, more than three years after Raines's petition and supplemental motion were filed, the district court issued a notice of intent to dismiss and an order denying the request for counsel. The court later issued its memorandum decision and order of dismissal on May 4, 2007.

Raines's petition and subsequent filings with the district court range in topic from biblical prophecy to bull riding, but center most relevantly for our purposes on alleged errors by the district court, alleged prosecutorial misconduct, and alleged ineffective assistance of counsel.

II.

DISCUSSION

Raines appeals from the district court's summary dismissal of his petition for post-conviction relief. On review of a post-conviction relief petition dismissed without an evidentiary hearing, this Court must determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file. We liberally construe the facts and reasonable inferences in favor of the non-moving party, *Cowger v. State*, 132 Idaho 681, 684-85, 978 P.2d 241, 244-45 (Ct. App. 1999); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993), but we do not give evidentiary value to mere conclusory allegations that are unsupported by admissible evidence. *Phillips v. State*, 108 Idaho 405, 407, 700 P.2d 27, 29 (1985); *State v. Ayala*, 129 Idaho 911, 915, 935 P.2d 174, 178 (Ct. App. 1996); *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994). Therefore, on appeal from the summary dismissal of an application for post-conviction relief the inquiry is whether the application, affidavits, or other evidence supporting the application allege facts which, if true, would entitle the applicant to relief. *Parrott v. State*, 117 Idaho 272, 274, 787 P.2d 258, 260 (1990); *Roman*,

125 Idaho at 647, 873 P.2d at 901; *Whitehawk v. State*, 116 Idaho 831, 833, 780 P.2d 153, 155 (Ct. App. 1989).

A. Errors by the District Court

Raines alleges that the court erred by failing to hold a competency hearing and by failing to inquire into his competency before accepting his guilty plea. Because these claims could have been presented on a direct appeal from Raines's judgment of conviction, they are not properly presented as post-conviction claims. Post-conviction proceedings are not a substitution for direct appeal, and "[a]ny issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings," subject to an exception that does not apply here. I.C. § 19-4901(b); *McKinney v. State*, 115 Idaho 1125, 1126, 772 P.2d 1219, 1220 (1989); *Hoffman v. State*, 125 Idaho 188, 190-91, 868 P.2d 516, 518-19 (Ct. App. 1994); *Henderson v. State*, 123 Idaho 138, 139, 844 P.2d 1388, 1389 (Ct. App. 1992). Consequently, these two alleged errors by the court are not eligible for consideration in post-conviction proceedings, and they were correctly dismissed.

B. Prosecutorial Misconduct

Raines alleges that the prosecutor in his case engaged in prosecutorial misconduct by making false statements, failing to offer Raines a lesser charge, and failing to call certain witnesses. Post-conviction proceedings can in the correct circumstances be a proper avenue for raising issues of prosecutorial misconduct. *State v. Carlson*, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000) (noting that in "certain circumstances" not existing there, prosecutorial misconduct may be addressed in post-conviction proceedings).

Raines has not shown, however, that his claims have any merit. Raines may have raised a factual issue as to the accuracy of the prosecutor's statements regarding Songer's intent to testify and the possibility of reconciliation between Songer and Raines. Even if the prosecutor's statements were inaccurate, however, Raines has made no showing that the prosecutor actually knew the statements to be inaccurate when they were made. He also has made no showing that the prosecutor's alleged false statements affected Raines's decision to plead guilty. If, as he alleges, Raines himself received letters from Songer in May 2003, apologizing to him and saying that she did not intend to testify against him, then his decision to plead guilty in October 2003 could not possibly have been influenced by the prosecutor's comments at Raines's preliminary hearing in May. Further, Raines could have presented any such letters as mitigating evidence at

his sentencing hearing. Raines has simply not shown that the prosecutor's statements, even if untrue, affected in any way the validity of Raines's conviction or sentence. Therefore, this claim was properly dismissed.

As to the prosecutor's failure to offer a lesser charge, there is no obligation for a prosecutor to offer a defendant an opportunity to plead guilty to a lesser charge. This claim simply bears no support in the law. Finally, Raines's claim that the prosecutor engaged in misconduct because he did not call certain witnesses is frivolous. The prosecutor had no occasion to call witnesses to testify at trial because Raines pleaded guilty. Even if Raines had decided to go to trial, the prosecutor would have been under no obligation to call specific witnesses desired by Raines. The district court correctly dismissed all of Raines's allegations of prosecutorial misconduct.

C. Ineffective Assistance of Counsel

Raines also claims that his defense attorney rendered ineffective assistance of counsel by breaching attorney-client confidentiality, coercing Raines into waiving his right to a speedy trial, failing to investigate and pursue exculpatory evidence, failing to communicate with or otherwise represent Raines during a period of approximately two weeks immediately following his arraignment, and failing to adequately prepare for a hearing or trial.

In order to prevail on a post-conviction claim of ineffective assistance of counsel an applicant must demonstrate both that his attorney's performance was deficient, and that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995); *Davis v. State*, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To show deficient performance, a defendant must overcome the strong presumption that counsel's performance was adequate by demonstrating "that counsel's representation did not meet objective standards of competence." *Roman*, 125 Idaho at 648-49, 873 P.2d at 902-03. If a defendant succeeds in establishing that counsel's performance was deficient, he must also prove the prejudice element by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Roman*, 125 Idaho at 649, 873 P.2d at 903. When applying the prejudice prong to a case where the petitioner's conviction was upon a guilty plea, the petitioner must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going

to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). That is, the petitioner must show that the subject matter of counsel’s mistake constituted “an important part of his decision to plead guilty.” *McKeeth v. State*, 140 Idaho 847, 851, 103 P.3d 460, 464 (2004). A petitioner’s mere self-serving assertion that he would not have pleaded guilty absent the mistake need not be accepted by the trial court. *Hayes v. State*, 143 Idaho 88, 93, 137 P.3d 475, 480 (Ct. App. 2006).

Raines’s claim that his counsel violated attorney-client confidentiality is based on his attorney’s act of sending to a psychologist letters that Raines wrote to the attorney. In its notice of intent to dismiss, the district court stated that “evidence suggests the letters were unrelated to legal services,” and that it was “likely that counsel provided the letters to the doctor in furtherance of legal services to [Raines] to determine whether [Raines] lacked the required *mens rea* to commit the crime.” Raines has shown no error in this determination. First, Raines has not included in the record on appeal the letters allegedly written to his counsel and subsequently passed on by his counsel to Raines’s examining psychologist. Without these letters, there is no evidence that they were in fact confidential--i.e., made “in furtherance of the rendition of professional legal services” and thus subject to the attorney-client privilege. Idaho Rule of Evidence 502(a)(5). Second, even assuming that the letters were for purposes of legal services, Raines has not shown that their disclosure violated the attorney-client privilege, for Rule 502(a) provides that a communication is “confidential” if it is “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client” Because the attorney’s alleged disclosure of Raines’s letters to a psychologist may have been for purposes of obtaining an opinion on whether Raines had the required *mens rea* for the crime, or to obtain a competency evaluation of Raines, or for other purposes in the furtherance of the rendition of professional legal services, no violation of the rule of privilege is shown. Finally, Raines made no showing that the disclosure of the letters prejudiced him. We thus find no error in the dismissal of this claim.

Raines next asserts that his counsel forced him to waive his right to a speedy trial, but the evidence in the record does not support this allegation. A letter from his attorney that Raines placed in evidence shows that counsel merely informed Raines of the situation and advised him that it would be to his advantage to waive his speedy trial right. The letter made it clear that the decision was Raines’s to make. The evidence Raines offers on this claim shows no pressure or coercion from his defense counsel.

Raines's claim of ineffective assistance of counsel due to failure to investigate and pursue exculpatory evidence is also unsupported. While some of the evidence that Raines refers to might have tended to cast doubt on Songer's reliability as a witness, none of this evidence tended to show that Raines was innocent of the aggravated assault. In dismissing this claim, the district court stated:

There is no dispute that a neighbor placed a 911 call whereupon emergency personnel discovered the victim seriously injured. The Petitioner does not dispute that he struck her, but disputes that he choked her. Whether he choked her is irrelevant since there is no dispute that he struck her. It is not necessarily exculpatory for the Petitioner that the victim had mental problems, substance abuse problems, and a past criminal history. Such circumstances do not give the Petitioner a license to physically assault the victim.

We agree with the district court's reasoning. Thus, Raines has shown no prejudice from counsel's failure to obtain the evidence of Songer's mental health problems and alleged misconduct. Such evidence would not have meaningfully undermined the strength of the State's case against Raines, and therefore would not logically have affected his decision to plead guilty instead of going to trial.

Raines also claims his counsel was deficient because counsel apparently did not communicate with Raines until just before his preliminary hearing, approximately two weeks after his arraignment. Raines has presented no evidence that this was a deficient performance nor that he suffered any prejudice because of it.

Because Raines has made no prima facie showing that his attorney's performance was deficient or that Raines was prejudiced by the deficiency, his claims of ineffective assistance of counsel were properly dismissed.

D. Delay in Consideration of Petition for Post-Conviction Relief

Finally, we take up Raines's complaint that his petition for post-conviction relief and motion for counsel were allowed to linger more than three years before the district court took any action on them. We must acknowledge that this delay is troublesome. Between the filing of Raines's petition on December 15, 2003, and the district court's Order Denying Appointment of Counsel and Notice of Intent to Dismiss filed on February 21, 2007, Raines filed a number of motions and other documents in an apparent effort to prompt action from the court, including a motion for summary judgment filed on November 2, 2004, a motion for summary disposition filed on December 23, 2004, a motion for default judgment and supporting affidavit filed

March 10, 2005, a petition for amended post-conviction relief filed August 2, 2006, a motion for a preliminary ruling and a petition for expedited hearing filed August 2, 2006, and a request for transcripts filed December 21, 2006. Such neglect of a pro se post-conviction action is very problematic, and in the event of a meritorious post-conviction claim, it could cause years of unjustified incarceration of a petitioner.

Nevertheless, we conclude that the district court's delay in acting on Raines's petition does not entitle Raines to any relief on appeal because, since we have already determined that Raines's post-conviction claims were without merit and properly subject to summary dismissal, the delay caused no actual prejudice to Raines. Our research has disclosed no factually similar cases, but we analogize to *State v. Gallipeau*, 128 Idaho 1, 2-3, 909 P.2d 619, 620-21 (Ct. App. 1994), where an appealing criminal defendant did not receive the transcripts he requested for the appeal until nearly a year after their due date. Gallipeau filed a petition for a writ of habeas corpus because of the court reporter's delay in preparing the transcripts. As a remedy, he requested that his convictions be vacated and that he be released from prison. *Id.* at 3, 909 P.2d at 621. We recognized that "an extreme delay of the appellate process may, in some circumstances, rise to the level of a due process violation." *Id.* In considering how to evaluate whether a delay in an appeal has actually deprived the party of due process, we noted that most courts had chosen one of two distinct analytical approaches. *Id.* Our ultimate holding relied upon neither approach, however, as we noted that both required "some showing of prejudice . . . in order to establish a deprivation of due process," and that Gallipeau had shown none. *Id.* at 4, 909 P.2d at 622. We stated that prejudice occurs only if the appellant "has been impaired in his or her ability to present the appeal, to obtain meaningful relief through the appeal, or to defend in the event that the case is remanded for a new trial or other proceedings." *Id.*

Raines has shown no such prejudice here. Although his post-conviction action was delayed even more significantly than Gallipeau's appeal, Raines has suffered no prejudice from the delay inasmuch as his petition contained no allegations that could have entitled him to relief. Egregiousness of delay does not equate to prejudice, and where there is no prejudice there will be no relief.

III.

CONCLUSION

The district court's order summarily dismissing Raines's petition for post-conviction relief is affirmed.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**